NOTE

PROBLEMS OF RES JUDICATA CREATED BY EXPANDING "CAUSE OF ACTION" UNDER CODE PLEADING

The change in procedural law brought about as a result of the advent of code pleading raises the question of the proper role of res judicata in the code system. One of the basic attributes of code pleading is the abolition of the distinction between law and equity. In place of these two systems of independent trial courts, there is found one court which results from a fusion of the former two. It was a major objective of the reform movement to expand the permissible scope of one trial to enable resolution of an entire controversy. Consequently, there arises the problem of the application of res judicata to this expanded scope: to what extent should the full measure of issues which could have been litigated fall within the doctrines of merger and bar?

CONCEPTS OF RES JUDICATA

The broad field of law into which this Note fits is that dealing with judgments. For many years there has been something of an eclipse of legal analysis on the subject of judgments. The last comprehensive treatment in book form was the 1925 edition of Freeman's treatise.[1] In more recent years, certain concepts have been defined and new descriptions devised, and it may be helpful briefly to review those which will be referred to in this Note.[2]

Res judicata literally means a matter adjudged or a thing judicially acted upon or decided.[3] From long usage it has come to encompass generally the effect of one judgment upon a subsequent trial or proceeding.[4] Two quite distinct aspects are included: first, the effect of a judgment in a subsequent action between the parties based upon the same cause of action; second, the effect on the parties in a trial on a different cause of action.[5]

Where the same cause of action is involved, the doctrine can be summarized: plaintiff's cause of action is merged in a final judgment if he wins,

1. 2 FREEMAN, JUDGMENTS (5th ed. 1925).

2. The most recent broad treatment of res judicata is *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

3. BLACK, LAW DICTIONARY 1470 (4th ed. 1951).

4. *Ibid.* See also *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 n.1 (1952).

5. See, *e.g.*, Piro v. Shipley, 33 Pa. Super. 278, 281-83 (1907); von Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 300-01 (1928); RESTATEMENT, JUDGMENTS §§ 47-55, 68-72 (1942).

or barred by it if he loses.[6] The scope of the merger or bar includes not only matters actually litigated but also all matters that should have been litigated.[7] Frequently this doctrine is referred under the generic name of res judicata, although it is sometimes termed "technical" res judicata to distinguish it from its broader root.[8] The second part of res judicata has come to be known as collateral estoppel.[9] When the parties to a former trial are litigating a different cause of action, any issue of fact and certain issues of law, which were actually litigated and which were essential to the judgment, are conclusively determined by the judgment in the initial trial and cannot be relitigated or challenged.[10]

This Note is primarily concerned with problems of "technical" res judicata. The subject can be described as an inquiry into how much of the expanded scope of trial made possible by the fusion of law and equity under a system of code pleading is properly translated into "matter that *should* have been litigated" for purposes of invocation of the doctrines of merger or bar. To do so, it is helpful first to consider the application of these doctrines in a jurisdiction where there has been no fusion.

Relationship of Equity Decrees and Legal Judgments Before Fusion

In jurisdictions administering law and equity in independent systems of trial courts, that very independence was a primary factor in the development of a set of doctrines defining the relationship between rulings of the two court systems. Since they were administered separately, in the normal course of events, a plaintiff entitled to recovery from both might obtain his relief via two proceedings. Similarly, in some instances where the legal and equitable remedies were alternatives, two trials could come about if the plaintiff first pursued a remedy which was denied him for reasons not precluding his recovery of the other. In these cases, a judgment or decree, for or against him, did not necessarily bring into play the doctrines of merger or bar.

Most of the litigation involving a combination of legal and equitable elements began with the equity suit followed by the action at law. At some point, the chancellor developed a procedure whereby the necessity for the second trial was eliminated. Having obtained jurisdiction to try the equitable issues, the chancellor continued to dispose of the legal issues in order to

6. Restatement, Judgments §§ 47, 48 (1942).

7. For an excellent statement of the doctrine, see von Moschzisker, *supra* note 5, at 300.

8. See 103 U. Pa. L. Rev. 273, 274 (1954).

9. See Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 3 n.4 (1942), for a discussion of the reasoning of the authors of the *Restatement of Judgments* for using the phrase.

10. *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 840 (1952); Restatement, Judgments §§ 68(1), 70 (1942).

terminate the entire controversy in one trial. [11] In this process, which has been aptly described as "equitable clean-up," [12] there are two discretionary elements. First, an option lies with the plaintiff whether or not to seek clean-up.[13] If he does not request it, neither the defendant nor the chancellor could move to dispose of the legal part of the case. The failure to ask for resolution of the entire controversy was not penalized on the ground that plaintiff had split his cause of action.[14] The second discretionary element in an equitable clean-up case lay with the chancellor who could determine whether or not to grant the plaintiff's request, if made.[15]

When the first part of the case completed was the equitable, the problem of res judicata was whether plaintiff's cause of action was barred if he lost, or merged into the decree if he won. If the plaintiff had asked only for equitable relief which was denied, or if the plaintiff sought clean-up and was denied both remedies, the important question determinative of whether a later action was barred was the basis for the chancellor's denial of the equitable remedy.[16] For example, the chancellor may have found that an equity court lacked jurisdiction to decide the controversy. Dismissal on such a ground by a court of law or equity is not deemed a final adjudication for purposes of "technical" res judicata.[17] On the other hand, the chancellor may have denied the equitable relief on a principle of a "court of conscience," such as laches, unclean hands, etc. Again it was held that the plaintiff was not barred from proceeding at law for his legal remedy.[18] A different level of cases includes those in which the equity court decided the

11. 1 POMEROY, EQUITY JURISPRUDENCE §§ 181, 231 (5th ed., Symons 1941). LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 67 (2d ed. 1908).

12. See Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation,* 100 U. PA. L. REV. 320 (1951).

13. The option to seek equitable clean-up was not available in all law-equity combinations. See, *e.g.,* Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), *cert. denied,* 277 U.S. 594 (1928), an anti-trust case in which the court granted an injunction but refused damages because of necessity of a jury trial to settle the issue of treble damages.

Sometimes the equitable decree is made conditional upon the legal judgment. Cases of injunction against nuisance may result in the chancellor's granting equitable relief unless the defendant pays the sum specified as damages. See authorities collected in Keeton and Morris, *Notes on "Balancing the Equities,"* 18 TEXAS L. REV. 412, 420-21 n.23 (1940). Although in theory such an award includes both legal and equitable remedies, it raises independent considerations of the relationship of judgments of law and equity.

14. See text at notes 15-25 *infra.*

15. See Levin, *supra* note 12, at 339-46.

16. RESTATEMENT, JUDGMENTS § 65(2), comments *h, i* (1942); 2 FREEMAN, JUDGMENTS § 646 (5th ed. 1925).

17. See *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818, 835-39 (1952).

18. Linnertz v. Dorway, 246 Ill. 485, 92 N.E. 938 (1910); Farmers' and Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 N.E. 956 (1907); Lewis v. Baker, 151 Pa. 529, 25 Atl. 99 (1892); Haue v. Thum, 67 So. 2d 643, 645 (Fla. 1953) (dictum). See COOK, EQUITY 1116-26 (4th ed., Van Hecke 1948), and note 16 *supra.*

A recent study indicates that this freedom to seek legal rights in a court of law is almost completely theoretical, since, in practical effect, there are defenses cognizable at law corresponding to most equitable defenses. Frank and Endicott, *Defenses in Equity and "Legal Rights,"* 14 LA. L. REV. 380 (1954).

case on its merits against the plaintiff. If the litigation involved an issue that would be pivotal in a subsequent legal trial, then the docrine of collateral estoppel is sufficient to foreclose a successful second day in court.[19] For example, an equity decree denying specific performance was based on a holding that the contract sought to be enforced is invalid; a later action for damages for breach of the contract cannot succeed if the equity finding on a matter actually litigated and essential to the decree is accepted as binding.[20] Many of the equity-law cases involving res judicata do not go beyond collateral estoppel, since the difficulty arises from the overlap of issues more than the failure to litigate issues that should have been adjudicated. That is not to say, however, that "technical" res judicata was not applied in this type of case. An example is the suit for specific performance of a contract which was terminated before the taking of evidence. In a later action for damages based on the same contract, the court found that the earlier dismissal was with prejudice and invoked the doctrine of bar to prevent recovery.[21] Since there were no issues actually litigated, the result cannot rest on collateral estoppel.

If the plaintiff was successful in his equity suit, it was held that he could still bring an action at law for further relief if his cause of action warranted both legal and equitable remedies.[22] The law of collateral estoppel frequently lightened the burden of proof by preventing relitigation of matters already threshed out in the equity suit which were material to the action at law. For example, when a decree in chancery adjudicated a dispute over title to certain land, this was held conclusive as to plaintiff's title when he later brought an action for ejectment.[23] On he other hand, the plaintiff was precluded from recovery at law where the legal remedy is but an alternate form of relief for the equitable remedy. This latter concept was generally thought of, not as res judicata, but rather in the frame of reference of election of remedies.[24] It nevertheless expressed in part the finality which law courts accorded to decrees in equity.

When the sequence of events was such that the proceeding in the law court came before the suit in equity, similar doctrines were used.[25] One

19. *E.g.,* Windolph v. Lippincott, 107 N.J.L. 468, 155 Atl. 23 (1931); Williamsburgh Savings Bank v. Town of Solon, 136 N.Y. 465, 32 N.E. 1058 (1893); Mayfield Co. v. Rushing, 133 Tex. 120, 127 S.W.2d 185 (1939). See cases collected in COOK, *op. cit. supra* note 18.

20. Windolph v. Lippincott, *supra* note 19; Mayfield Co. v. Rushing, *supra* note 19. See also Smith v. Haymond, 135 W. Va. 638, 64 S.E.2d 105 (1951).

21. Ogsbury v. La Farge, 2 N.Y. 113 (1848).

22. Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908); Morency v. Plourde, 96 N.H. 344, 76 A.2d 791 (1950); Chapman v. General Petroleum Corp., 152 Ore. 147, 52 P.2d 190 (1935); Perdue v. Ward, 88 W. Va. 371, 106 S.E. 874 (1921). All of these cases involved an action for legal relief after a successful suit for injunctive relief.

23. Hutchinson v. Patterson, 226 Mo. 174, 126 S.W. 403 (1910).

24. See, *e.g.,* 5 CORBIN, CONTRACTS §§ 1222, 1223 (1951).

25. *E.g.,* in suits for specific performance after an action for damages: Connihan v. Thompson, 111 Mass. 270 (1873); Otto v. Young, 227 Mo. 193, 127 S.W. 9 (1910); Van Buren v. Fine, 101 N.J. Eq. 373, 139 Atl. 486 (Ch. 1927). *But see* Belding v. Whittington, 154 Ark. 561, 243 S.W. 808 (1922).

special situation arose in cases which frequently developed in law before equity. Often a party to a contract sued for breach of the contract as expressed in a written document. Finding to his dismay that a provision in the document prevents his recovering, he moved over to equity where he filed suit to reform, strike out or modify the fatal clause.[26] It was sometimes held that, if plaintiff had adopted a position of fact in the legal action (*e.g.*, the document contains the contract), he was precluded from changing that position in the suit in equity (*e.g.*, a clause in the contract should be striken or modified).[27] When the fact is crucial to any recovery, the rule in effect denied relief to the plaintiff. In a closely related type of case, however, the courts would not preclude the plaintiff from seeking reformation after having lost in an action on the contract. Thus, if the plaintiff in the case above had maintained throughout the legal action that the critical clause was not operative because of a parol agreement of the parties, but lost because the court is powerless to receive evidence contradicting the written contract, then the equity suit was allowed to reform the agreement.[28]

This interrelationship of law and equity was not above quite valid objections. The first and most obvious criticism could be directed toward a procedure which necessitated the parties carrying on two completely independent suits in order to accomplish what might be effected into one proceeding. Moreover, the existence of two independent systems, each according finality to judgments of the other, could also produce monuments to the injustice of inflexible application of technical rules of law like the famous case of *Read v. Allen*.[29]

This multiple trial problem began in a court of equity with a bill of interpleader that had been filed by a real estate manager to determine which of two disputing heirs was entitled to rents of an estate that had passed under an ambiguous will. The chancellor, after the hearing, decreed that *A* should prevail over *B*. *B* appealed this decision. While that appeal was pending, *A* instituted an action at law for ejectment to establish his legal title to disputed land. Despite *B*'s efforts to stay the proceedings until the appeal had been disposed of, a judgment for *A* was entered on the ground that the equity interpleader decree was collateral estoppel in the ejectment action. Later, after the time for taking an appeal from the ejectment ruling had passed, the appellate court reversed the interpleader decree and found that *B*, not *A*, was really entitled to the land under the will. Thereupon, *B* began an ejectment action against *A* to recover the land now determined rightfully to be his. Ultimately the United States

26. Washington v. Sander, 167 Ark. 420, 268 S.W. 604 (1925); Washburn v. Great Western Ins. Co., 114 Mass. 175 (1873); Note, *Election of Remedies: A Delusion?*, 38 COLUM. L. REV. 292, 300 n.64 (1938).

27. See cases cited in note 26 *supra*.

28. Northern Assurance Co. v. Grand View Bldg. Ass'n, 203 U.S. 106 (1906); Sadowski v. General Discount Corp., 81 F. Supp. 381 (E.D. Mich. 1948), *aff'd*, 183 F.2d 542 (6th Cir. 1950).

29. 286 U.S. 191 (1932).

Supreme Court held that the first ejectment action, although based entirely on a decree that had been overruled, was res judicata and could not be collaterally attacked. *B* tried once more, this time in equity. He asked to have *A* declared to be a constructive trustee of the land for the benefit of *B*.[30] The court of appeals refused, again relying on the ground of res judicata; the Supreme Court denied certiorari.

Professor Moore made this comment about the case:

> "The set of operative facts was sufficient to give rise to an equitable action of interpleader and a legal action in ejectment, but insufficient to found the basis of a third cause of action which would do simple justice between the parties! If when a set of operative facts which should be handled as a suit is split up into conceptual causes of action that produce the above solution, it should be clear that the administration of justice can be better served by treating a set of operative facts in a pragmatic fashion." [31]

Read v. Allen undoubtedly makes a strong argument for proponents of a system of code pleading. If one trial had resolved both the legal and equitable issues, the disastrous confusion of finality of judgments would not have occurred. The question then arises whether a reform of the system that led to *Read v. Allen,* whereby the parties are required to resolve their entire controversy in one trial, raises problems that also can result in a denial of justice.

Relationship of Equity Decrees and Legal Judgments After Fusion

In many instances, the adoption of code pleading has resulted in a change in the law of res judicata as applied to cases that involve a combination of law and equity. Because of the fusion of these two formerly independent bodies of law, it is now possible for a plaintiff to obtain full relief in one proceeding.[32] Proponents of code pleading point to this opportunity to settle the entire controversy as one of the advantages of the reform. However, the desirability of translating this *opportunity* to obtain full relief into a *requirement* that every plaintiff do so by barring any subsequent action is the nub of the res judicata problem.

Illustrative of the decisions of courts following fusion is the leading case of *Gilbert v. Boak Fish Co.*[33] A hotel owner sued a fish company to enjoin a nuisance and for damages of $50,000. The court granted the

30. Allen v. Johnson, 70 F.2d 927 (D.C. Cir.), *cert. denied,* 293 U.S. 572 (1934).

31. 2 Moore, Federal Practice 388 (2d ed. 1948). For other comment, see authorities collected in Clark, Code Pleading 475 n.152 (2d ed. 1947).

32. Even under a fused system, it is not necessarily true that the plaintiff, having been denied equitable relief, can have clean-up. See Levin, *supra* note 12.

33. 86 Minn. 365, 90 N.W. 767 (1902).

injunction but denied any recovery in damages because of insufficient pleading of that claim. Subsequently, the hotel owner brought a separate action for damages and was met with the defense of res judicata. The Minnesota court held that the action was barred. According to the court it was immaterial that the plaintiff had unsuccessfully pleaded for damages in the first trial; indeed, it would have made no difference if he had not attempted to recover damages at all.[34] Inasmuch as both legal and equitable rights can be enforced in one action in Minnesota, the plaintiff had but one cause of action which he has split, and res judicata precludes further proceedings.

This rule is deemed proper by Judge Charles E. Clark, who, in his treatise *Code Pleading,* writes:

> "There seems no occasion for adopting the inconvenient rule that there are separate causes of action for each claim, legal or equitable; in fact to do so would be to set aside the well-settled rule of res judicata applied before the codes, namely, that matter once threshed out either at law or in equity could not be again litigated in the other tribunal. Formerly a litigant in the wrong court was not thereby prevented from going into the other court; but there is no longer occasion for that particular rule. Hence the rule against splitting a cause of action is properly applied to prevent the litigation of legal and equitable claims on such cause at different times."[35]

This rule, used in the *Gilbert* case, and approved by Judge Clark, is quite inflexible. It purports to admit of no exceptions. Its underlying theory is that litigants should be forced to make use of the new and improved processes of code pleading. However, the invocation of the doctrine of "technical" res judicata in any case, not necessarily one involving a law-equity combination, is a very harsh step.[36] It is one of the few procedural devices or rules for the violation of which the penalty is complete loss of remedy. Some courts have attempted to find exceptions[37] or

34. *Accord,* Crawford v. Baker, 86 Ga. App. 855, 72 S.E.2d 790 (1952); Naugle v. Naugle, 89 Kan. 622, 132 Pac. 164 (1913); Thompson v. Myrick, 24 Minn. 4 (1877); Inderlied v. Whaley, 85 Hun. 63, 32 N.Y. Supp. 640 (Sup. Ct. 1895). Similar results have been reached where a party fails to raise a defense in the initial action and later returns as a plaintiff, relying on the substance of that defense. Liberty Mut. Ins. Co. v. Hathaway Baking Co., 306 Mass. 428, 28 N.E.2d 425 (1940); Wholey v. Columbia Nat'l Life Ins. Co., 69 R.I. 254, 32 A.2d 791 (1943). This result may follow even though the court hearing the initial suit did not have jurisdiction to grant defendant his due relief. Fairview-Chase Corp. v. Scharf, 225 App. Div. 232, 232 N.Y. Supp. 530 (1st Dep't 1929); Yager v. Bedell, 206 App. Div. 803, 201 N.Y. Supp. 466 (3d Dep't 1923).

35. CLARK, CODE PLEADING 475-76 (2d ed. 1947).

36. Cleary, *Res Judicata Reexamined,* 57 YALE L.J. 339, 349 (1948), citing Judge Clark's dissent in Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945).

37. *E.g.,* International Curtis Marine Turbine Co. v. United States, 74 Ct. Cl. 132, 56 F.2d 708 (1932); *In re* 431 Oakdale Ave. Bldg. Corp., 28 F. Supp. 63 (N.D. Ill. 1939); Saypol v. Wolf, 165 Misc. 517, 1 N.Y.S.2d 199 (Sup. Ct. 1937); Hyyti v. Smith, 67 N.D. 425, 272 N.W. 747 (1937); Annot., 142 A.L.R. 905 (1943).

manipulated "cause of action" language in a very strange fashion.[38] Writers have re-analyzed the doctrine to sift out the purposes for which it exists.[39] It is appropriate to consider these purposes of the res judicata doctrine in cases involving combinations of legal and equitable remedies in order to determine whether those purposes will be served by making the entire possible controversy under code pleading subject to the rules of merger or bar.

Underlying Rationale of "Technical" Res Judicata

There are five principal bases underlying the doctrine of res judicata.[40] They explain why a legal system must afford a measure of finality to decisions of its courts. One of the most often expressed is the desire to free defendants from vexatious litigation at the hands of a plaintiff who brings successive suits. Once the matter has been threshed out in a fair proceeding before a competent tribunal, the defendant should not be put to the expense and trouble of defending again, whether he won or lost in the initial trial. Closely related to this basis, in the sense of primary concern for the parties involved, is the danger of double recovery. If a plaintiff, who has already been granted relief by one court, is permitted to relitigate his claim before another, there is a possibility that the remedy of the second will overlap or duplicate that of the first.

The other three bases deal less with the individual parties in the suit in question and focus, rather, upon the dictates of an efficient judicial process. There is a limit to the number of cases that the courts can handle in any given period. Since there are usually many litigants waiting to be heard, the expeditious disposal of claims necessitates that courts economize in the time spent on any one case. One way this is effected is by making the first determination final. In addition, it is clearly desirable from the standpoint both of the parties and the administration of justice that we have a court system that produces stable decisions, upon which reliance can be placed, and that there be a preclusion of inconsistent results.

Two of the justifications for barring a plaintiff after one trial are subject to some limitation when viewed in light of the problem of whether or not to allow separate trials for the legal and equitable segments of a case. One of these is the goal of freeing the defendant from vexatious litigation. This is frequently mentioned in reference to preventing a plaintiff from dividing up his total claim into many claims aggregating his total and bringing suit on each and every one of the fractions. This consideration seems less convincing in the law-equity problem. There the upper limit

38. *Compare* the language of General Discount Corp. v. Sadowski, 183 F.2d 542 (6th Cir. 1950), *with* Crawford v. Baker, 86 Ga. App. 855, 72 S.E.2d 790 (1952).

39. *E.g.*, Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948); Schopflocher, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 ORE. L. REV. 319, 321 (1942).

40. Most of these are described in Cleary, *supra* note 39, at 344-45.

of possible suits is generally two. For the same reason, the argument that it is necessary to economize in the use of court time to resolve any one dispute is not so strong. This qualification by no means removes the impact of these two factors, however. Even if the problem means only division of the case into two proceedings, the burden on both the parties and the court system can be quite serious. The administrative aspect alone of insuring that the parties, their attorneys and the witnesses are available when the court is ready to hear a case can encompass much loss of time and considerable expense. Added to that is the duplication of assessable costs and other similar expenses. And although the doctrine of collateral estoppel can be invoked to prevent relitigation of matters previously decided, there can develop a divergence of views as to what was actually decided so that one of the major problems in the trial becomes the litigation over the collateral estoppel issue itself. It is easily possible to minimize unduly the practical impact of even a division of one trial into two.

In evaluating the other rationale for the existence of the doctrine of "technical" res judicata as applied to cases of mixed law-equity nature, it is helpful to recognize that there are three basic patterns which characterize the relationship of the legal part of the case to the equitable. The first is that in which the equitable remedy is given in addition to the legal. This is exemplified by the case in which the plaintiff seeks and is entitled to both an equitable injunction and legal damages.[41] Another familiar example is the specific performance-damages combination. The second pattern is closely related to this first. In one sense this too involves additional relief, but the initial remedy is merely a preliminary step toward the heart of the litigation. This covers the case of the equitable decree of reformation of a contract preceding an action at law for breach of the contract.[42] Generally the reformation decree is not sought as an end in itself, although it is not inconceivable that two parties to a contract might frame a suit in the procedural setting of a request for reformation in order to settle ambiguities in the contract writing or to determine the effect of extrinsic matter upon the writing, in a manner comparable to a declaratory judgment action, where both are ready and willing to perform under the contract according to the outcome of the litigation.

The third pattern of relationship between legal and equitable remedies is the situation wherein the two are alternatives. A land purchaser may seek either specific performance or damages for breach of contract.[43] The defrauded buyer can pursue his remedy either at law or in equity.[44] It is in

41. *E.g.*, Gilbert v. Boak Fish Co., 87 Minn. 365, 90 N.W. 767 (1902).

42. See, *e.g.*, Northern Assurance Co. v. Grand View Bldg. Ass'n, 203 U.S. 106 (1906); General Discount Corp. v. Sadowski, 183 F.2d 542 (6th Cir. 1950); Cohen v. Globe Indemnity Co., 37 F. Supp. 208 (E.D. Pa. 1940); Gibson v. American Ins. Co., 146 Fla. 171, 200 So. 357 (1941).

43. *E.g.*, Mayfield Co. v. Rushing, 133 Tex. 120, 127 S.W.2d 185 (1939); and cases collected in Annot., 124 A.L.R. 1214 (1940).

44. Weigel v. Cook, 237 N.Y. 136, 142 N.E. 444 (1923).

this type of case that courts frequently indulge in "vague dissertations" about election of remedies instead of discussing "technical" res judicata.[45] Cleary suggests that this indicates judicial dissatisfaction with the doctrine of res judicata, since, by utilizing election of remedies language, courts frequently can find that the plaintiff is not barred from coming into court again after an unsuccessful first try.[46]

Before fusion, each of these three types of law-equity related remedies generally could be sought in two trials without running afoul of the doctrine of technical" res judicata,[47] although in some states the election of remedies might effectively prevent recovery of alternative relief.[48] Only in the equitable clean-up case could the plaintiff obtain his full measure of recovery in one trial by asking the chancellor for both remedies, if they were supplementary, or either, if they were alternatives.

With respect to the danger of double recovery, the first two categories of relationship of remedies are ex hypothesis outside the rationale. Where the equitable decree is authorized in addition to or is a preliminary for the legal recovery, the fact that a plaintiff recovers in two suits does not mean that he receives more than that to which he is entitled. However, it is a very real factor in the third class where the remedies are alternatives and plaintiff has been successful in the initial trial. In *McCreary v. Stallworth*[49] a purchaser sued and won specific performance of a land sale contract with an abatement in the purchase price because of the vendor's inability to convey more than a five-eighth's interest in the property. Then plaintiff brought an action against the vendor for breach of contract and sought money damages for the same delict. Any recovery would have been a double recovery, since the initial suit completely resolved the controversy. A similar danger can arise where a legal action has preceded the suit in equity.[50] "Technical" res judicata is properly invoked in such cases whether or not there has been a fusion of law and equity.

One of the curious aspects of the problem of double recovery when legal and equitable remedies are alternatives is found in the famous case of *Hahl v. Sugo*.[51] Defendant had erected a building which encroached a few inches onto the plaintiff's land. Plaintiff secured a judgment in an action for ejectment, but the sheriff refused to execute the judgment since

45. Cleary, *supra* note 39, at 349, citing Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943), as an example.

46. *Ibid.*

47. See text at notes 15-25 *supra.*

48. See text following note 25 *supra.*

49. 212 Ala. 238, 102 So. 52 (1924).

50. *Cf.* Medley v. Brown, 202 S.W. 137 (Tex. Civ. App. 1918). (Plaintiff sued and recovered damages for loss of value of his land when the state built a bridge restricting ingress; later he raised his house and sued to enjoin the state from restricting the entranceway to the raised house.)

51. 169 N.Y. 109, 62 N.E. 135 (1901). For commentary on this case, see materials collected in CLARK, CODE PLEADING 475 n.151 (2d ed. 1947).

removal of the few inches of the building that were trespassing would result in collapse of the entire building. Then plaintiff instituted a second suit to enjoin defendant to remove his own building. The defense of "technical" res judicata carried the day. Analytically, this type of situation does not involve the danger of double recovery in the sense of plaintiff receiving $100 for a $50 injury by suing twice. It is merely a case in which there were two means to accomplish one end, namely removal of the encroachment. The means first chosen, an ejectment action, turned out to be a pyrrhic victory.[52] Here plaintiff lost all chance of effective relief by the fortuitous twist that he happened to have won in the initial trial. It is difficult to see much practical difference, however, between this plaintiff and one who brought an action on the contract, lost under the terms of a written contract, and thereafter sued for reformation to add, strike or modify a provision of the agreement.[53] In both cases plaintiff initially made an error as to the legal road to recovery; in neither does the first judgment necessarily preclude a later suit by virtue of collateral estoppel, *i.e.*, substantively, no impediment lies in the path of the second type of remedy because of the first suit. Nevertheless, in one case "technical" res judicata is applied and in the other plaintiff is free to try again.

The category of cases in which the legal and equitable remedies are alternatives is also the biggest problem area in terms of stability of judicial decisions and preclusion of inconsistent results. If the two are supplementary, the result in the initial litigation is generally carried over to the second by way of collateral estoppel so that the decision is not collaterally attacked but rather is used as the keystone of the later action.[54] However, where the remedies are alternatives and plaintiff lost the first suit, there is the danger that a later action for the alternate remedy may be only a subterfuge for relitigating matter that should be permanently decided. This type of case is sometimes treated by a good faith test of plaintiff's first choice of remedy,[55] while elsewhere plaintiff is given greater leeway when the doctrine of election of remedies is used and the theory followed that there has been no election unless two choices did in fact exist.[56] Heavy

52. A similar situation arose in Pennsylvania when plaintiff won an injunction to protect an easement across defendant's land, but the defendant had destroyed possibility of use of the easement. It was held that plaintiff could recover full damages even though he already had an injunction. Piro v. Shipley, 33 Pa. Super. 278 (1907). *But cf.* Hellstern v. Hellstern, 279 N.Y. 327, 18 N.E.2d 296 (1938); Schmidt v. Weyell, 60 Misc. 370, 113 N.Y. Supp. 630 (Sup. Ct. 1908).

53. See note 26 *supra* and accompanying text.

54. *Cf.* Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1909).

55. See, *e.g.*, 2 RESTATEMENT, CONTRACTS § 383 (1932).

56. See Justices Brandeis, Holmes and Taft dissenting in United States v. Oregon Lumber Co., 260 U.S. 290, 302 (1922); Justice Cardozo in Schenck v. State Line Telephone Co., 238 N.Y. 308, 144 N.E. 592 (1924); Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1944).

emphasis is placed upon a kind of estoppel.[57] When these analyses are used, the court is finding a way to allow a plaintiff to present his claim, even though once defeated, because the defeat stemmed from a basis not applicable to the alternate remedy.

In a jurisdiction that has fused law and equity, it is easy to hold that plaintiff might have sought both the legal and equitable remedies alternatively and should not be allowed to do so by way of two suits. Such was the reasoning of the court in a recent New Jersey decision, *Ajamian v. Schlanger*.[58] There a defrauded purchaser doggedly pursued the equitable remedy of rescission, although the court found it should have been obvious that either laches or ratification would prevent recovery.[59] After an adverse judgment, plaintiff sought money damages for legal fraud, against which laches and ratification are no defense. The court barred the claim.

It is interesting to compare the opinions from the New Jersey Superior and Supreme Courts. There were three opinions filed in the lower court. The judges were divided over the proper application of the doctrine of election of remedies. All agreed that it was inappropriate to deem an election to have been made unless the plaintiff had in fact two inconsistent remedies. The opinion of the court found that he had not,[60] the dissent disagreed,[61] and the concurring opinion noted that the position of the dissent represented the older view which was being displaced by the majority view.[62] In the Supreme Court the decision did not turn on this issue; that opinion centered upon the recent adoption of code pleading in New Jersey and the desirability of deciding the "entire controversy" in one trial. Failure of the plaintiff to pursue his legal remedy in the first trial was termed "highly imprudent."[63] Later the court found that it amounted to a "deliberate and conscious waiver of his legal remedy."[64]

The court was clearly not concerned about preclusion of inconsistent results.[65] It was admitted that the precise grounds for the decision in the rescission trial were inapplicable to the claim for damages. This was not an attempt to attack collaterally a previously unfavorable judgment. The Supreme Court of New Jersey was announcing that the opportunity provided by the new procedure to settle an entire controversy in one trial would

57. Schenck v. State Line Telephone Co., 238 N.Y. 308, 309, 144 N.E. 592, 593 (1924). 5 CORBIN, CONTRACTS § 1220 (1951).

58. 14 N.J. 483, 103 A.2d 9, *cert. denied*, 348 U.S. 835 (1954).

59. *Id.* at 488, 103 A.2d at 12.

60. Ajamian v. Schlanger, 29 N.J. Super. 497, 500, 103 A.2d 3, 4 (App. Div. 1953).

61. *Id.* at 507, 103 A.2d at 9.

62. *Id.* at 501, 103 A.2d at 5.

63. 14 N.J. at 486, 103 A.2d at 11.

64. *Id.* at 488, 103 A.2d at 12.

65. The decision has been said not to be based on election of remedies, but rather on estoppel caused by weakness of counsel. 5 CORBIN, CONTRACTS § 1225 (Supp. 1954).

henceforth be a requirement. In the future a plaintiff, thinking that he has the choice of alternative remedies, will be "highly imprudent" to press for the more desirable of the two until judgment if he is mistaken as to its availability. Rather, the court expects him to ask for both in the alternative and to choose one or the other, at the latest at the close of proof. Although the rationale was not the danger of inconsistency, the court may be said to have been concerned with the necessity for stable judicial decisions. The opinion specifically expressed concern for the possibility of multiplicity of suits if the entire controversy were divisible.[66]

It seems a fair conclusion from the analysis of the rationale of res judicata in the context of the law-equity problems that there is some justification for desiring to end the entire controversy in one trial. Although some of the arguments are less convincing, perhaps, in this context than generally, there is still much benefit to be derived from preventing the divers disadvantages resulting from a multiplicity of suits. Therefore, it is pertinent to find and evaluate what basis there is for a counter-argument —that the parties should be allowed to divide the litigation according to the former pattern of trials at law and in equity, even though the advent of code pleading means that both trials would be in the same court and that both could have been treated in one proceeding.

Sources of Pressure for Permitting Division of the Controversy

The root of any argument against requiring that litigants take advantage of the benefits made possible by fusion of law and equity under code pleading is the fact that complete fusion has not, probably cannot be effected. While many of the characteristics of the former practice have been obliterated, there remain vestiges of the distinctions that developed between the two systems which vitally affect the substantive rights of the parties. A discussion of three of them will point up the problem: the right to trial by jury, the desire for the same measure of recovery possible before fusion, and the relationship of the right to amend with the degree to which the pleadings control the course of the trial.

The Right to Trial by Jury

It has been indicated that the greatest single obstacle blocking a complete fusion of law and equity in code pleading jurisdictions is the problem of the mode of trial.[67] Embodied in constitutions and statutes are provisions which guarantee litigants a right to jury trial, and generally that right is defined in terms of historical perspective.[68] This creates a dilemma that is difficult of solution: on one hand the code pleading reform purports to

66. 14 N.J. at 486, 103 A.2d at 12.

67. Levin, *supra* note 12, at 321-22.

68. Note, *The Right to Jury Trial Under Merged Procedures,* 65 HARV. L. REV. 453-54 (1952).

abolish distinctions between law and equity; on the other, problems of right to jury trial must be answered in terms of those distinctions.[69] The more successful the code is in obliterating any differences that existed, the more difficult it becomes to determine mode of trial under the code.[70]

Much has been written to help solve the difficulty. "The considerable scholarship addressed to the dilemma has variously produced vast schemes of classification, monuments of historical research, and what seem simplifications of the problem. The variety of answers may attest to the complexity of the problem. . . ."[71] There have been suggestions that the entire action be tried to the jury or court according to whether the case is "predominantly" legal and "incidentally" equitable, or vice versa.[72] Others have suggested that all cases be tried by jury,[73] or that the various questions of fact be assigned according to the inherent capabilities of the jury or judge to decide them.[74] The most widely accepted solution is the "split trial" with the issues being tried in their appropriate mode by an historical test.[75]

The major difficulty with the "split trial" technique is that historically the same issue could arise in either law or equity cases; it was the combination of issues that set the character of the action, not one issue itself.[76] Proponents of "split trials" differ as to the proper way to overcome this. Some would have a "basic nature of the issue" test;[77] another suggestion turns upon the "preferred theory of the pleadings" by the plaintiff.[78] Pike and Fischer would classify the cases into three groups depending upon whether, before fusion, one trial or two trials were required or the plaintiff had the option to seek relief in one or two trials.[79] If plaintiff had to obtain full relief in one action, the mode of trial under fusion would be the same as before.[80] If plaintiff had to recover in two trials, they were

69. McCaskill, *Jury Demands in the New Federal Procedure,* 88 U. PA. L. REV. 315 (1940).

70. *Ibid.*

71. Note, 65 HARV. L. REV. 453 (1952).

72. Fraser v. Geist, 1 F.R.D. 267 (E.D. Pa. 1940), adopted such a view from the language of FED. R. CIV. P. 39(c).

73. See, *e.g.,* Van Hecke, *Trial by Jury in Equity Cases,* 31 N.C.L. REV. 157 (1953).

74. Note, 65 HARV. L. REV. 453, 465-66 (1952).

75. The phrase, "split trial," is used to describe trials that combine legal issues and equitable issues. The former are tried by jury, the latter by the court. See Kharas, *A Century of Law—Equity Merger in New York,* 1 SYRACUSE L. REV. 186, 205 (1949); Morris, *Jury Trial Under the Federal Fusion of Law and Equity,* 20 TEXAS L. REV. 427 (1942).

76. McCaskill, *Jury Demands in the New Federal Procedure,* 88 U. PA. L. REV. 315 (1940).

77. 5 MOORE, FEDERAL PRACTICE 148-58 (1951).

78. Morris, *Jury Trial Under the Federal Fusion of Law and Equity,* 20 TEXAS L. REV. 427 (1942).

79. Pike & Fischer, *Pleadings and Jury Rights in the New Federal Procedure,* 88 U. PA. L. REV. 645, 654-59 (1940).

80. *Id.* at 658-59.

distinct enough to enable division in the "split trial." [81] And where the plaintiff had the option to seek equitable clean-up or not, the mode of trial depended not upon the character of the pleading but simply on whether or not the plaintiff asked for both legal and equitable relief from the chancellor. They conclude that the same distinction is operative after fusion; plaintiff still has control of the mode of trial through his choice to bring two suits or one.[82] Where plaintiff seeks resolution of the entire controversy in one trial, by analogy to equitable clean-up, the case is tried without a jury. To save a right to jury trial, plaintiff merely divides his case into two parts.

Pike and Fischer's determination that, in the third category, a joinder of claims for legal and equitable relief operates to make the case one for the court [83] is closely akin to the doctrine of waiver of the right to jury that has developed, particularly in the New York courts.[84] Unfortunately, the second trial upon which Pike and Fischer rely to save the right to the jury trial is not possible if the doctrine of "technical" res judicata is invoked to compel disposal of the entire controversy in one proceeding. The effect of applying the doctrine of waiver or the Pike and Fischer rule together with that of res judicata is brought out sharply in *Sklarsky v. Great Atlantic & Pacific Tea Co.*[85] Grocer, in leasing his store, had secured from Landlord a covenant prohibiting any competitor of Grocer from leasing any of the Landlord's other adjoining stores. The A & P, with knowledge of the covenant, leased one of Landlord's nearby stores. Grocer obtained an injunction from a New York state court requiring the A & P to vacate. Thereafter Grocer brought an action for damages in a federal district court. The court held that the claim was barred by "technical" res judicata, although it candidly admitted in the opinion that, had Grocer joined his demands for an injunction and damages, he would not have been entitled to trial by jury on the damage issue. The court stated that Grocer ". . . had his election and he took it." [86]

This position is undoubtedly an extreme one among the proponents of the "split trial" technique, but it highlights the failure of many states to devise a process under code pleading that allows the same use of jury trial as was found under pre-code practice. So long as that prevails there will be occasions in which one or the other of the parties to a suit will believe that his legal position would be stronger under the former practice. To the extent that the code has made modifications, there will be pressure to allow a division of the trial of the case into two hearings so that the

81. *Id.* at 655-56.

82. *Id.* at 656-68.

83. If plaintiff ". . . brings one [action], he should not get it [*i.e.*, jury trial]; nor should the defendant." *Id.* at 656.

84. DiMenna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917); Kharas, *supra* note 75, at 202. See also CLARK, CODE PLEADING 120-22 (2d ed. 1947).

85. 47 F.2d 662 (S.D.N.Y. 1931).

86. *Id.* at 665.

historical mode of trial can be used. This is the source of pressure to exempt the second trial of a law-equity case from the doctrine of "technical" res judicata which would otherwise stymie two trials.[87]

The Desire for the Same Measure of Recovery

A second reason for opposing a requirement that an entire controversy be resolved in one trial, enforced by operation of the doctrine of "technical" res judicata, is the possibility that the compulsory single trial may result in a lesser recovery than the plaintiff otherwise would have received in two trials. There are two ways in which this can come about: one is a matter of timing of recovery; the second stems from the different rules of law and equity on the measure of damages.

The analysis of the difficulty of the timing of relief can be begun with the case of *June v. George C. Peterson Co.*[88] Lessor had deposited certain bonds with his Lessee to insure his compliance with the terms of the lease. Later Lessee threatened to sell the bonds, and Lessor sued for an injunction which was denied because of "unclean hands." Thereafter Lessee did sell the bonds and Lessor brought an action for damages. Although essentially the same conduct and the same contract were the basis of both trials, the court held the defense of "technical" res judicata inapplicable. It seems virtually impossible to argue for a different result. At the time of the injunction suit, there was no ground for seeking damages since the bonds had not been sold.[89]

The impossibility of combining the request for an equitable injunction and legal damages in one trial is sharply etched in the *June* case. It is no less of a factor, however, in other circumstances. *Gilbert v. Boak Fish Co.*[90] is illustrative. The trial court refused the damage claim because of insufficient pleading of the claim, although the injunction was granted. Later, when plaintiff again sought damages after remedying the defect of the prior suit, the action was held to be barred by "technical" res judicata. The opinion does not indicate what the defect was in plaintiff's case that warranted denial of recovery in the first trial. However, it may have been the result of the different type of facts that must be adduced to substantiate a claim for legal rather than equitable relief. In a case like *Gilbert,* the injunction will be granted on a showing of the existence of a nuisance and

87. Of course, the pressure could equally be directed toward modification of the rules determining right to jury trial rather than res judicata. It is the coexistence of the two that creates the problem. However, a substantial modification of the right to jury trial would be possible only by constitutional amendment in most states, while res judicata is a judicially enunciated principle.

88. 155 F.2d 963 (7th Cir. 1946).

89. An analogous problem is raised when two suits are conducted concurrently. If either is binding as "technical" res judicata, it is often a matter of chance which is the first decided. See Church v. Gallic, 76 Ark. 423, 88 S.W. 979 (1905); Hoffstetter v. George M. Myener Constr., Inc., 170 Kan. 464, 227 P.2d 115 (1951); Brice v. Starr, 90 Wash. 369, 156 Pac. 12 (1916).

90. 86 Minn. 365, 90 N.W. 767 (1902). See text following note 33 *supra.*

the suffering of irreparable injury. However, to support the claim for money damages, the plaintiff must document the precise manner in which he has suffered losses and the precise extent of those losses. Frequently procedural codes demand that claims for damages be averred with precision and particularity.[91] As a result, it is quite likely that in many instances a plaintiff will be able to win his equitable relief before his legal case is completed. If the rule of a complete settlement of the entire controversy in one trial is enforced, the plaintiff will have to forego either speedy equitable relief or recovery of both the equitable and the legal remedies.

Related to the problem of timing of recovery is the second aspect of imperfect fusion of law and equity which can result in the plaintiff receiving a smaller recovery than would have been received under pre-code practice. This concerns the different treatment of law and equity in the granting of damages for injury suffered after the initiation of the suit but before the close of trial. "It is sometimes said broadly that in actions at law damages are given only to the commencement of the action, but in equity to the time of trial." [92] More accurately, in an action at law plaintiff cannot recover for injuries sustained as a result of the defendant's violating a continuing duty after commencement of the action; law courts do allow recovery for injury suffered after the action is begun if that injury is attributable to a delict of the defendant committed before that time.[93] Equity, however, had a rule of convenience: full damages were awarded for all injury in order to terminate the controversy.[94] This comported with the spirit of granting equitable clean-up.

From either of these procedures, then, the plaintiff was assured a full measure of damages. Under fusion, however, the confusion which was noted earlier about the character of a trial for purposes of jury trial is also found found here. In a "split trial" for example, the one issue that seems clearly to fall within the province of the jury is that of damages. Presumably, therefore, the measure of those damages will be that of former law practice. The differences in the way that evidence is marshalled for consideration by the judge as compared with that for the jury justified the more flexible rule of equitable clean-up cases. But in presenting a case to a jury, there must be greater safeguards against misleading them, and consequently we have, among other procedures, the rules of full pleading of damage claims which set the cut-off point in damage consideration at

91. See CLARK, CODE PLEADING 329-30 (2d ed. 1947).

92. MCCORMICK, DAMAGES 47 (1935).

93. The type of case involved is that in which defendant's delict is negative in character, *i.e.*, generally allowing a condition to go on which he is under a legal duty to change. Examples are the continuing trespass or nuisance and some breaches of contract. *Id.* at 49-51. It includes those delicts which frequently entitle the plaintiff to a combination of legal and equitable remedies: injunction plus damages. The distinction between cases where recovery of damages for injury occurring after commencement of the action is or is not allowed is seen in a comparison of Chicago & N.Y. Ry. v. Hoag, 90 Ill. 339 (1878) and N. K. Fairbank Co. v. Bahne, 213 Ill. 636, 73 N.E. 322 (1905).

94. MCCORMICK, *op. cit. supra* note 92, at 51.

the commencement of the action. In some cases this would seem to work to the financial detriment of the plaintiff.

The Right To Amend the Pleadings

A third area in which the operation of "technical" res judicata on a law-equity case leads to an unhappy result is in the effect of the pleadings as controlling the course of a trial and the freedom to amend. This is a problem in those jurisdictions which, although they have modified and reformed their procedural law, still require that the pleadings be cast in terms of the older legal or equitable actions. A fairly recent New York decision sets up the problem. In *International Recording Machines, Inc. v. Microstat Corp.*,[95] a suit was brought for reformation of a contract. The trial court found no basis for reformation, but went on to hold that a case of breach of contract had been shown and awarded damages to the plaintiff therefor. The appellate division reversed because the pleadings alleged a suit in equity while the judgment was not equitable but legal.[96]

Any restriction on the right to amend the pleadings, particularly to amend to conform to the evidence, is insofar a requirement that the course of the trial be controlled by the pleadings. Where such a practice is found, there will be serious miscarriage of justice if the doctrine of "technical" res judicata is also employed to preclude overcoming the failings of the first trial by a second suit. Perhaps the clearest example is the converse of the *Microstat* case. A party to a contract sues for breach thereof and discovers that he is unable to recover because of certain provisions in the contract, which he argues are inapplicable. In order to convert his legal action for breach of contract into an equitable suit to reform the contract, there must be either freedom to amend or leave to begin the litigation afresh. If neither opportunity is available, a result closely akin to the common law is achieved whereby the parties are seriously hurt by faults at the pleading stage of a trial.

Conclusion

The proper relationship doctrine of "technical" res judicata, or its counterpart, election of remedies, and the procedural opportunities for settlement of an entire controversy in one trial is not simple to determine. The answer that has found favor among some advocates of code pleading is deceptively easy. They argue that litigants should be compelled to take advantage of the increased liberality of code pleading, but underlying this

95. 269 App. Div. 485, 56 N.Y.S.2d 277 (1st Dep't 1945).

96. The opinion of the trial court, International Photo Recording Machines, Inc. v. Microstat Corp., 183 Misc. 394, 48 N.Y.S.2d 196 (Sup. Ct. 1944), was reversed. The appellate division's decision was distinguished in April Productions, Inc. v. Schirmer, 131 N.Y.S.2d 341 (1st Dep't 1954), *aff'd on other grounds*, 308 N.Y. 366, 126 N.E.2d 283 (1955). See also Union Mutual Life Ins. Co. v. Friedman, 139 F.2d 542 (2d Cir. 1944).

conclusion is the premise that the one trial under fusion does not alter the legal rights of the parties under the former practice. However, it is found that procedure under code pleading does not always completely approximate practice where there has been no fusion of law and equity. Consequently, cases will arise in which one or other of the parties is, or deems himself to be, prejudiced if the opportunity for separate trials is denied. Moreover, the legal device whereby that division of the controversy is precluded is the doctrine of "technical" res judicata, one of the few procedural rules carrying the absolute penalty of preclusion of all remedy regardless of the substantive merit of the claim. Its application to this latter problem, like many other legal questions, comes down to a weighing of conflicting or competing desires. The ultimate question is whether the loss, in terms of the rationale of res judicata, which would be caused by allowing litigants to forego the opportunity of combining requests for legal and equitable remedies if they so desire, justifies preventing them from proceeding in separate trials. If it may be assumed that most litigants will be happy to take advantage of the opportunity to settle their entire controversy in one trial, then the balance seems to favor leaving open the possibility of dividing the case into its legal and equitable parts in those cases in which the rights of the parties would be altered if only one proceeding is allowed.